



Jackie Porter, CFP

Award Winning Financial Planner

Carte Wealth Management

905 238 3535 x 234

askjackie@cartewm.com | askjackie.ca

The Essential Check List for an Effective Estate Plan

Your estate plan is put in place to implement your wishes regarding yourself and your property in the case of mental or physical incapacity and after death, while minimizing and funding taxes. The plan takes effect through execution of the appropriate legal documents put in place. It can be as simple as having powers of attorney and a Will, or as complex as planning for successive generations to take over a family business through the use of an estate freeze and family trusts.

Every Canadian over the age of majority should have a basic estate plan: a Will and powers of attorney. Inclusion of additional documents will depend on the nature of your assets and your ultimate objectives. Your professional advisors can suggest the most appropriate arrangements for you.

The following checklists will help guide you through the process.

1. List your assets

- What assets do you own?
- In whose name are they registered? Are they registered jointly with your spouse or another person?
- When and at what cost did you acquire the assets?
- If real estate, have you built or renovated the property, and, if so, what was the cost?
- Do you have life insurance and have you named a beneficiary?
- Do you have an RRSP, RRIF, pension plan or other similar retirement plan, and, if so, have you named a beneficiary?
- Do you own a family business? What are the details? For example: the name of the company, ownership structure, directors, officers and accountant information, year-end details and up-to-date corporate records. Do any relatives work in the business? Are there employment contracts in place? Is there a shareholders' agreement?



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- Are you named as a current or contingent beneficiary of any trust? Do you have any powers over the trust, such as a power to change trustees or appoint beneficiaries through your Will or otherwise?
- Do you have assets in other provinces or countries?
- Are there any liabilities associated with the assets?

2. Determine your legal obligations

The planning techniques appropriate for you depend not only on the types of assets you own, your exposure to taxes and your obligations to creditors, but also on what your legal responsibilities are to others:

- Are you married or living common-law?
- Were you or your spouse previously married?
- Do you have a domestic contract with your spouse or partner?
- Do you have children?
- Are any of your children disabled?
- Are any of your children under the age of majority or in ^[1]_{SEP} post-secondary education?
- Do you have any stepchildren?
- Are you financially supporting any other person, such as a parent?
- Are you subject to any contractual or financial obligations such as a partnership agreement or loan agreement? Each of these things will be unique to your family and your personal circumstances.

3. Plan for incapacity

All Canadian provinces have legislation allowing you to name someone to make decisions about your property if you become incapable of making them yourself. The document is known as a Continuing or Enduring Power of Attorney. (In Quebec the document is called a “mandat” or “procuration.”) Most provinces also allow you to name someone, either in the Continuing Power of Attorney for property or in a separate document (as in Ontario) or health care directive to make health and personal care decisions for you if you cannot make them yourself. If you are incapable and have no power of attorney in place, a member of your family will have to go through a lengthy and expensive court process to have someone named as the guardian of your property.

The questions you must ask yourself before granting someone authority over you or your property are:

- Who do you trust to make these decisions for you?
- Do you want the person deciding your personal care to be different from the person appointed to look after your property?
- Do you want to name more than one person, and, if so, must decisions be unanimous, or can they act by majority where there are more than two? Can they act independently of one another?
- Will your attorneys know where to locate a current inventory of your assets and necessary documents such as deeds, bank records, tax returns or insurance policies?
- Do you want to remain in your residence for as long as possible or do you want to leave the decision up to your attorneys?
- Have you signed an organ donation card? Do your attorneys know your wishes regarding the maintenance or withdrawal of life support?
- Can your attorneys use your assets for the support of your spouse or partner and your children? Can they fund the education of your adult children?
- Can your attorneys make gifts on your behalf to friends, family or charities?
- Can your attorneys make loans to friends or family?
- Do you want to restrict the investments an attorney can make for you?
- If you own a family business, will the attorney run the business or wind it up?
- Will your attorneys be entitled to financial compensation for looking after you and your assets?
- If you have joint assets with your spouse or another individual, does the joint holder have to account for the assets to your attorneys or can the joint holder treat the assets as his or her own?

4. Plan to reduce probate tax

A Will is probated, that is to say proved to be the valid last Will of a deceased person when the executor named in the Will must satisfy a third party that he or she has the authority to deal with the deceased's assets. It is generally required if there are publicly traded securities, real estate or large bank accounts or other investments registered in the deceased's name alone. With the exception of Quebec,* each province levies a tax or charges fees when an application is made to prove the Will. Nova Scotia, Ontario and British Columbia charge the highest rates (as high as 1.523%, 1.5% and 1.4% respectively) and Alberta charges the lowest fee of \$400.

In Ontario and British Columbia especially, there are planning techniques to reduce the amount payable to probate a Will that can include:

- Holding assets jointly so ownership passes automatically to the surviving joint holder and does not form part of the deceased's estate (most commonly between spouses or partners).
- Naming beneficiaries for RRSPs and other similar plans and life insurance policies, allowing the proceeds to pass directly to the recipient.
- Using a trust to receive proceeds of life insurance or a plan where the intention is to benefit a minor.
- Making gifts during life instead of passing the assets through the estate.
- Using more than one Will, where probate tax is charged only on the value of the assets governed by the Will being proved and not on the value of the estate's overall assets.

5. Make a Will

If you die without a Will, a court will appoint the person who, under the applicable provincial legislation, has the highest right to administer your estate (generally first a spouse, then adult children, then parents, etc.). Provincial legislation will also determine who will receive your property and in what proportions. In Ontario, for example, if you die without a Will leaving a spouse but no children, the spouse will receive the entire estate. If you have a spouse and one or more children, the spouse receives the first \$200,000 and how much of the remainder the spouse gets depends on how many children you have. Where no spouse and no child survives, the estate passes to the parents, and if no parent, then to siblings. The inheritance of any child who is under 18 is held by the Accountant of the Superior Court until the child turns 18, at which time he or she will receive the full inheritance. Having a Will ensures the people you wish to benefit actually do benefit to the extent and in the manner that you intend. It also enables you to select the person who will act as your executor and administer your estate, which entails collecting your assets, paying your debts (including taxes), investing your estate and managing the investments as required. The estate may be immediately distributable or it may require that some or all of it be held in trust for a period of time, in which case your executor will manage the trust. The executor must distribute your estate to the persons entitled under your Will when it is time to do so.



Planning your Will takes forethought, and you may want to ask yourself the following questions:

- Who do you wish to carry out your plan and administer your estate?
- Do you want to name more than one person, and, if so, must decisions be unanimous or can they act by majority where there are more than two? Will you name alternates in case the first named executors cannot act?
- Have you named beneficiaries to receive the proceeds of your life insurance policies and RRSP or similar retirement plans, or do you need to deal with this in your Will or through a separate trust?
- Will your executors know where to locate an inventory of your assets and necessary documents such as deeds, bank records, tax returns or insurance policies?
- Have you considered establishing a trust for your spouse or children for income-splitting or other purposes?
- Have you considered what rights your spouse, children or other dependents may have against your estate if you do not make adequate provision for them?
- At what age do you wish your children to receive their inheritance? Should they receive it in stages at various ages? Will they be entitled to income from the inheritance after a certain age, or will it be up to your executors to decide what needs to be provided for them?
- If one of your children dies before acquiring the entire inheritance, would you want his or her children to receive the remaining inheritance, and, if so, at what age should grandchildren get it?
- Do you wish to leave any specific articles to anyone?
- Do you wish to leave a cash legacy to anyone? Immediately or only after you and your spouse are gone?
- Do you wish to make any charitable bequests, and, if so, immediately or only after both you and your spouse are gone?
- Who will be the guardian of your children if both you and your spouse are gone?
- Who should your estate go to if something happens to the whole family, or your spouse and your children?
- If you have a family business, how is it to be run and for how long after your death? Is it to be sold or wound up? Will your executors run it? Do you want to consider methods to minimize the impact of taxes payable on your business interest when you die?
- Do you own any assets in another province or country, which may be subject to the laws of that jurisdiction?
- Do you retain citizenship in a country that has death taxes or will not recognize a Canadian Will?
- Do you have beneficiaries resident in, or citizens of, another jurisdiction that may affect their inheritance?

6. Reviewing your planning

Your estate plan should not stay out of sight, out of mind. There are circumstances when you should review your planning:

- Has it been five years or more since you created or updated your Will?
- Have you separated, divorced or married in the meantime?
- Has anyone named in your Will or other documents died or become incapacitated?
- Have you had children or grandchildren since you signed your Will?
- Are you obligated to provide financial support to anyone in circumstances not covered by your current plan?
- Does any executor named in your Will need to be changed?
- Do any beneficiaries need to be removed from or added to your Will? Do your executors have current address information for each of them?
- Do you have any special-needs beneficiaries not currently included in your Will (such as elderly parents or disabled dependents)?
- Do you wish to add bequests to any persons or charities?
- Has your estate grown materially since you last reviewed your affairs?
- Do you have adequate liquid assets or life insurance to deal with taxes payable upon your demise?

Does your current planning minimize the impact of estate administration tax (probate fees) as much as possible? Estate planning is a legally complex area and it is impossible to answer all the questions you may have in one article. For advice pertaining to your specific objectives and circumstances, you should consult a qualified professional advisor.

This article was prepared by Clare A. Sullivan a partner in the Tax and Estate Planning group at Aird & Berlis LLP. The firm is a leading provider of services in the area of estate and tax planning.

This is one of a series of articles prepared for CIBC. The series is written by professionals in fields such as taxation, trusts and estates.



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